PART 2 INSTRUCTIONS CONCERNING CERTAIN MATTERS OF EVIDENCE

Introductory Comment

Instructions concerning evidence may be used during the trial, or in the final instructions or at both times. They are collected here for easy reference.

2.01 Stipulations

[Updated: 6/14/02]

The evidence in this case includes facts to which the lawyers have agreed or stipulated. A stipulation means simply that the government and the defendant accept the truth of a particular proposition or fact. Since there is no disagreement, there is no need for evidence apart from the stipulation. You must accept the stipulation as fact to be given whatever weight you choose.

Comment

Where there are stipulations that are legal as well as factual, it is safest to include them in the jury instructions. The First Circuit has said: "We express no opinion on whether the government's duty to prove each element of a crime beyond a reasonable doubt is diluted impermissibly if the jury instructions do not submit the stipulation for the jury's consideration. This thorny question has divided the courts of appeals. . . ." United States v. Meade, 175 F.3d 215, 222 n.2 (1st Cir. 1999) (citations omitted).

2.02 Judicial Notice

[Updated: 6/14/02]

I believe that [judicially noticed fact] [is of such common knowledge] [can be so accurately and readily determined] that it cannot be reasonably disputed. You may, therefore, reasonably treat this fact as proven, even though no evidence has been presented on this point.

As with any fact, however, the final decision whether or not to accept it is for you to make. You are not required to agree with me.

Comment

Use of an instruction like this was approved in United States v. Bello, 194 F.3d 18, 25-26 (1st Cir. 1999); see also Fed. R. Evid. 201(g).

2.03 Impeachment by Prior Inconsistent Statement

[Updated: 6/14/02]

You have heard evidence that before testifying at this trial, [witness] made a statement concerning the same subject matter as [his/her] testimony in this trial. You may consider that earlier statement to help you decide how much of [witness's] testimony to believe. If you find that the prior statement was not consistent with [witness's] testimony at this trial, then you should decide whether that affects the believability of [witness's] testimony at this trial.

Comment

This instruction is for use where a witness's prior statement is admitted only for impeachment purposes. Where a prior statement is admitted substantively under Fed. R. Evid. 801(d)(1), this instruction is not appropriate. Once a prior statement is admitted substantively as non-hearsay under Rule 801(d)(1), it is actual evidence and may be used for whatever purpose the jury wishes. No instruction seems necessary in that event, but one may refer to Federal Judicial Center Instructions 33 and 34.

2.04 Impeachment of Witness Testimony by Prior Conviction

[Updated: 6/14/02]

You have heard evidence that [witness] has been convicted of a crime. You may consider that evidence, together with other pertinent evidence, in deciding how much weight to give to that witness's testimony.

Comment

(1) This instruction is adapted from Eighth Circuit Instruction 2.18, Ninth Circuit Instruction 4.08 and Federal Judicial Center Instruction 30, all of which are very similar.

(2) In United States v. Noone, 913 F.2d 20, 33 n.20 (1st Cir. 1990), the First Circuit noted that an instruction on impeachment by prior conviction should be given where witness credibility was an important part of the defense and the jury may have been misled at *voir dire*.

2.05 Impeachment of Defendant's Testimony by Prior Conviction

[Updated: 6/14/02]

You have heard evidence that [defendant] was convicted of a crime. You may consider that evidence in deciding, as you do with any witness, how much weight to give [defendant]'s testimony. The fact that [defendant] was previously convicted of another crime does not mean that [he/she] committed the crime for which [he/she] is now on trial. You must not use that prior conviction as proof of the crime charged in this case.

Comment

This instruction is adapted from the Fifth Circuit Instruction 1.13 and Federal Judicial Center Instruction 41. It is intended for use when the defendant's prior conviction is admitted under Fed. R. Evid. 609. If the evidence of the prior act was admitted under Rule 404(b), see Instruction 2.06.

2.06 Evidence of Defendant's Prior Similar Acts

[Updated: 6/14/02]

You have heard [will hear] evidence that [defendant] previously committed acts similar to those charged in this case. You may not use this evidence to infer that, because of [his/her] character, [defendant] carried out the acts charged in this case. You may consider this evidence only for the limited purpose of deciding:

(1) Whether [defendant] had the state of mind or intent necessary to commit the crime charged in the indictment;

or

(2) Whether [defendant] had a motive or the opportunity to commit the acts charged in the indictment;

or

(3) Whether [defendant] acted according to a plan or in preparation for commission of a crime;

or

(4) Whether [defendant] committed the acts [he/she] is on trial for by accident or mistake.

Remember, this is the only purpose for which you may consider evidence of [defendant]'s prior similar acts. Even if you find that [defendant] may have committed similar acts in the past, this is not to be considered as evidence of character to support an inference that [defendant] committed the acts charged in this case.

Comment

(1) See Fed. R. Evid. 105; Huddleston v. United States, 485 U.S. 681, 691-92 (1988) ("[T]he trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted."). "Perhaps the safe course for a district court, whenever the matter is in doubt, is (where asked) to give a closing general instruction that bad character is not a permissible inference." United States v. Randazzo, 80 F.3d 623, 630 (1st Cir. 1996). Randazzo contains a discussion of the "distinction between 'direct evidence' and 'other crimes' or 'Rule 404(b)' evidence." Id.; see also United States v. Santagata, 924 F.2d 391, 393-95 (1st Cir. 1991).

(2) This instruction is based upon Fifth Circuit Instruction 1.30 and Eighth Circuit Instruction 2.08.

(3) Courts should encourage counsel to specify and limit the purpose or purposes for which prior act evidence is admitted. One or more of the above instructions should be given only for the corresponding specific purpose for which the evidence was admitted. Instructions for purposes other than that for which the specific evidence was admitted should not be given.

2.07 Weighing the Testimony of an Expert Witness

[Updated: 6/14/02]

You have heard testimony from persons described as experts. An expert witness has special knowledge or experience that allows the witness to give an opinion.

You may accept or reject such testimony. In weighing the testimony, you should consider the factors that generally bear upon the credibility of a witness as well as the expert witness's education and experience, the soundness of the reasons given for the opinion and all other evidence in the case.

Remember that you alone decide how much of a witness's testimony to believe, and how much weight it should be given.

Comment

This instruction is based upon Eighth Circuit Instruction 4.10.

2.08 Caution as to Cooperating Witness/Accomplice/Paid Informant

[Updated: 6/14/02]

You have heard the testimony of [name of witness]. [He/She]:

(1) provided evidence under agreements with the government;

[and/or]

(2) participated in the crime charged against [defendant];

[and/or]

(3) received money [or . . .] from the government in exchange for providing information.

Some people in this position are entirely truthful when testifying. Still, you should consider the testimony of these individuals with particular caution. They may have had reason to make up stories or exaggerate what others did because they wanted to help themselves.

Comment

(1) "Though it is prudent for the court to give a cautionary instruction [for accomplice testimony], even when one is not requested, failure to do so is not automatic error especially where the testimony is not incredible or otherwise insubstantial on its face." United States v. Wright, 573 F.2d 681, 685 (1st Cir. 1978); see also United States v. House, 471 F.2d 886, 888 (1st Cir. 1973) (same for paid-informant testimony). The language varies somewhat. United States v. Paniagua-Ramos, 251 F.3d 242, 245 (1st Cir. 2001) ("no magic words that must be spoken"); United States v. Hernandez, 109 F.3d 13, 17 (1st Cir. 1997) (approving "with greater caution" or "with caution"); United States v. Brown, 938 F.2d 1482, 1486 (1st Cir. 1991) (referring to the standard accomplice instruction as "with caution and great care"); United States v. Skandier, 758 F.2d 43, 46 (1st Cir. 1985) ("scrutinized with particular care"); United States v. Hickey, 596 F.2d 1082, 1091 n.6 (1st Cir. 1979) (approving "greater care" instruction). The standard is the same for witnesses granted immunity, United States v. Newton, 891 F.2d 944, 950 (1st Cir. 1989) (jury should be instructed that such "testimony must be received with caution and weighed with care"), and for paid informants, United States v. Cresta, 825 F.2d 538, 546 (1st Cir. 1987) ("the jury must be specifically instructed to weigh the witness' testimony with care").

(2) If a co-defendant has pleaded guilty, the jury must be told they are not to consider that guilty plea as any evidence against the defendant on trial. United States v. Gonzalez-Gonzalez, 136 F.3d 6, 11 & n.4 (1st Cir. 1998). It is incorrect to say that the guilty plea "is not evidence in and of itself of the guilt of any other person." Id.; United States v. Falu-Gonzalez, 205 F.3d 436, 444 (1st Cir. 2000).

(3) In United States v. Paniagua-Ramos, 251 F.3d 242, 248 n.3 (1st Cir. 2001), the court said in a footnote that, although a jury need not believe every government witness beyond a reasonable doubt, "where the accomplice's uncorroborated testimony is the only evidence of guilt, an admonition that the testimony must be believed beyond a reasonable doubt, if requested, would be advisable to guide the jury's deliberations."

2.09 Use of Tapes and Transcripts

[Updated: 6/14/02]

At this time you are going hear conversations that were recorded. This is proper evidence for you to consider. In order to help you, I am going to allow you to have a transcript to read along as the tape is played. The transcript is merely to help you understand what is said on the tape. If you believe at any point that the transcript says something different from what you hear on the tape, remember it is the tape that is the evidence, not the transcript. Any time there is a variation between the tape and the transcript, you must be guided solely by what you hear on the tape and not by what you see in the transcript.

[In this case there are two transcripts because there is a difference of opinion as to what is said on the tape. You may disregard any portion of either or both transcripts if you believe they reflect something different from what you hear on the tape. It is what you hear on the tape that is evidence, not the transcripts.]

Comment

(1) This instruction is based upon a trial court instruction approved in United States v. Mazza, 792 F.2d 1210, 1227 (1st Cir. 1986).

(2) The instruction for two transcripts is based upon United States v. Rengifo, 789 F.2d 975, 983 (1st Cir. 1986).

(3) There is abundant First Circuit caselaw concerning the admissibility of tapes, particularly when there is a dispute over their audibility and coherence. "This court has acknowledged the importance of ensuring that a transcript offered for use as a jury aid be authenticated 'by testimony as to how they were prepared, the sources used, and the qualifications of the person who prepared them.'" United States v. Delean, 187 F.3d 60, 65 (1st Cir. 1999) (citations omitted). But ultimately the matter is left to the trial court's "broad discretion" to decide "whether 'the inaudible parts are so substantial as to make the rest [of the tape] more misleading than helpful.'" United States v. Jadusingh, 12 F.3d 1162, 1167 (1st Cir. 1994) (quoting United States v. Font-Ramirez, 944 F.2d 42, 47 (1st Cir. 1991)); see also United States v. DiSanto, 86 F.3d 1238, 1250-51 (1st Cir. 1996); United States v. Saccoccia, 58 F.3d 754, 781 (1st Cir. 1995); United States v. Carbone, 798 F.2d 21, 24 (1st Cir. 1986). The decision whether to allow the transcripts to go to the jury also is committed to the trial judge's discretion, as long as the judge makes clear that the tapes, not the transcripts, are the evidence. United States v. Ademaj, 170 F.3d 58, 65 (1st Cir. 1999); United States v. Young, 105 F.3d 1, 10 (1st Cir. 1997); United States v. Campbell, 874 F.2d 838, 849 (1st Cir. 1989) (citing Rengifo, 789 F.2d at 980).

2.10 Flight After Accusation/Consciousness of Guilt

[Updated: 6/14/02]

Intentional flight by a defendant after he or she is accused of the crime for which he or she is now on trial, may be considered by you in the light of all the other evidence in the case. The burden is upon the government to prove intentional flight. Intentional flight after a defendant is accused of a crime is not alone sufficient to conclude that he or she is guilty. Flight does not create a presumption of guilt. At most, it may provide the basis for an inference of consciousness of guilt. But flight may not always reflect feelings of guilt. Moreover, feelings of guilt, which are present in many innocent people, do not necessarily reflect actual guilt. In your consideration of the evidence of flight, you should consider that there may be reasons for [defendant]'s actions that are fully consistent with innocence.

It is up to you as members of the jury to determine whether or not evidence of intentional flight shows a consciousness of guilt and the weight or significance to be attached to any such evidence.

Comment

(1) This instruction is based on United States v. Hyson, 721 F.2d 856, 864 (1st Cir. 1983); accord United States v. Camilo Montoya, 917 F.2d 680, 683 (1st Cir. 1990); United States v. Hernandez-Bermudez, 857 F.2d 50, 54 (1st Cir. 1988); United States v. Grandmont, 680 F.2d 867, 869-70 (1st Cir. 1982). "Evidence of an accused's flight may be admitted at trial as indicative of a guilty mind, so long as there is an adequate factual predicate creating an inference of guilt of the crime charged." Hernandez-Bermudez, 857 F.2d at 52; see also United States v. Zanghi, 189 F.3d 71, 83 (1st Cir. 1999); United States v. Luciano-Mosquera, 63 F.3d 1142, 1156 (1st Cir. 1995).

(2) A flight instruction also can be given when the flight in question was from the crime scene. Luciano-Mosquera, 63 F.3d at 1153, 1156; United States v. Hernandez, 995 F.2d 307, 314-15 (1st Cir. 1993).

(3) If there is more than one defendant, the instruction should clearly specify that the absence of a particular defendant from the trial cannot be attributed to the others and is not to be considered in determining whether the others are guilty or not guilty. United States v. Rullan-Rivera, 60 F.3d 16, 20 (1st Cir. 1995); Hyson, 721 F.2d at 864-65.

(4) The First Circuit has highlighted the need to engage in a Fed. R. Evid. 403 evaluation before admitting evidence of flight. Hernandez-Bermudez, 857 F.2d at 54 ("[I]t is a species of evidence that should be viewed with caution; it should not be admitted mechanically, but rather district courts should always determine whether it serves a genuinely probative purpose that outweighs any tendency towards unfair prejudice." (citation omitted)). Evidence of threats to a witness deserves the same treatment. See United States v. Rosa, 705 F.2d 1375, 1377-79 (1st Cir. 1983); United States v.

Gonsalves, 668 F.2d 73, 75 (1st Cir. 1982); United States v. Monahan, 633 F.2d 984, 985 (1st Cir. 1980); see also United States v. Rosario-Diaz, 202 F.3d 54, 70 (1st Cir. 2000).

(5) A similar instruction can be given when attempts to conceal or falsify identity might justify an inference of consciousness of guilt. See United States v. Otero-Mendez, 273 F.3d 46, 54 n.3 (1st Cir. 2001); United States v. Tracy, 989 F.2d 1279, 1285 (1st Cir. 1993).

(6) The First Circuit has also approved expanding the instruction to include "intentional hiding or evasion" when the evidence so warrants. United States v. Candelaria-Silva, 162 F.3d 698, 707 (1st Cir. 1998).

2.11 Statements by Defendant

[Updated: 6/14/02]

You have heard evidence that [defendant] made a statement in which the government claims [he/she] admitted certain facts.

It is for you to decide (1) whether [defendant] made the statement, and (2) if so, how much weight to give it. In making those decisions, you should consider all of the evidence about the statement, including the circumstances under which the statement may have been made [and any facts or circumstances tending to corroborate or contradict the version of events described in the statement].

Comment

(1) The instruction uses the word "statement" to avoid the more pejorative term "confession."

(2) A judge is required to give this instruction if the defendant has raised "a genuine factual issue concerning the voluntariness of such statements . . ., whether through his own or the Government's witnesses[.]" United States v. Fera, 616 F.2d 590, 594 (1st Cir. 1980). Under 18 U.S.C. § 3501(a), "[i]f the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances." (Dickerson v. United States, 530 U.S. 428 (2000), held that 18 U.S.C. § 3501 did not displace the constitutional requirements of Miranda v. Arizona, 384 U.S. 436 (1966), but Dickerson did not say that section 3501 has no effect at all. It seems safer, therefore, to charge in light of section 3501 even if Miranda requirements are satisfied.) See also Crane v. Kentucky, 476 U.S. 683, 687-91 (1986) (holding exclusion of testimony about circumstances of confession deprived defendant of a fair opportunity to present a defense). The First Circuit has held that, "[o]nce the judge makes the preliminary finding of voluntariness, the jury does not make another independent finding on that issue. Under this procedure, the jury only hears evidence on the circumstances surrounding the confession to aid it in determining the *weight or credibility* of the confession." United States v. Campusano, 947 F.2d 1, 6 (1st Cir. 1991) (quoting United States v. Nash, 910 F.2d 749, 756 (11th Cir. 1990) (quoting United States v. Robinson, 439 F.2d 553, 575 (D.C. Cir. 1970) (McGowan, J., dissenting))).

(3) In addition to determining whether a defendant's statement was voluntarily made, the court must "make[] a preliminary determination as to whether testimony about the confession is sufficiently trustworthy for the jury to consider the confession as evidence of guilt." United States v. Singleterry, 29 F.3d 733, 737 (1st Cir. 1994) (citations omitted). "The general rule is that a jury cannot rely on an extrajudicial, post-offense confession, even when voluntary, in the absence of 'substantial independent evidence which would tend to establish the trustworthiness of [the] statement.'" Id. (alteration in original) (quoting Opper v. United States, 348 U.S. 84, 93 (1954)). If evidence of the statement is admitted, "the court has the discretion to determine that the question of

trustworthiness is such a close one that it would be appropriate to instruct the jury to conduct its own corroboration analysis." Id. at 739. That is the purpose of the bracketed language in the instruction. "[A] judge has wide latitude to select appropriate, legally correct instructions to ensure that the jury weighs the evidence without thoughtlessly crediting an out-of-court confession." Id.

2.12 Missing Witness

[Updated: 8/12/02]

If it is peculiarly within the power of the government to produce a witness who could give material testimony, or if the witness would be favorably disposed to the government, failure to call that witness may justify an inference that [his/her] testimony would be unfavorable to the government. No such inference is justified if the witness is equally available or favorably disposed to both parties or if the testimony would merely repeat other evidence.

Comment

(1) According to United States v. Perez, No. 02-1060, 2002 WL 1772935, at *2 (1st Cir. Aug. 7, 2002), United States v. DeLuca, 137 F.3d 24, 38 (1st Cir. 1998), United States v. Lewis, 40 F.3d 1325, 1336 (1st Cir. 1994), and United States v. Welch, 15 F.3d 1202, 1214 (1st Cir. 1993), the decision to give this instruction is a matter of court discretion. See also United States v. Arias-Santana, 964 F.2d 1262, 1268 (1st Cir. 1992); United States v. St. Michael's Credit Union, 880 F.2d 579, 597-99 (1st Cir. 1989). The proponent of such an instruction must demonstrate that the witness would have been "either 'favorably disposed' to testify on behalf of the government by virtue of status or relationship or 'peculiarly available' to the government." Perez, 2002 WL 1772935, at *2. The court must then "consider the explanation (if any) for the witness's absence and whether the witness, if called, would be likely to provide relevant, non-cumulative testimony." Id.

(2) Where it is a confidential informant who is undisclosed by the government, if he or she is a mere tipster—i.e., if the person was not in a position to amplify, contradict or clear up inconsistencies in the government witnesses' testimony—his or her identity need not be disclosed. Indeed, in that circumstance the witness instruction would be improper, and presumably an abuse of discretion, because the informant is not essential to the right to a fair trial and the government has an interest in maintaining the confidentiality of identity. Lewis, 40 F.3d at 1336 (citing United States v. Martínez, 922 F.2d 914, 921, 925 (1st Cir. 1991)). Where a defendant has not previously sought disclosure of the confidential informant's identity, he or she is not entitled to the instruction. Perez, 2002 WL 1772935, at *3.

(3) All the missing witness instruction cases in the First Circuit appear to have been missing *government* witnesses. The cases often speak in terms of a "party," however, and this instruction might be revised accordingly. But a judge should exercise extreme caution in granting the government's request for such an instruction against a defendant. The Federal Judicial Center recommends that the instruction "not be used against the defendant who offers no evidence in his defense." Comment to Federal Judicial Center Instruction 39. Even if the defendant does put on a case and the instruction is given against the defendant, the following supplemental instruction may be warranted:

> You must, however, bear in mind that the law never compels a defendant in a criminal case to call any witnesses or produce any evidence in his behalf.

Sand, et al., Instruction 6-6.

2.13 Witness (Not the Defendant) Who Takes the Fifth Amendment

[Updated: 6/14/02]

You heard [witness] refuse to answer certain questions on the ground that it might violate [his/her] right not to incriminate [himself/herself]. You may, if you choose, draw adverse inferences from this refusal to answer and may take the refusal into account in assessing this witness's credibility and motives, but you are not required to draw that inference.

Comment

(1) This instruction is based upon United States v. Berrio-Londono, 946 F.2d 158, 160-62 (1st Cir. 1991), and United States v. Kaplan, 832 F.2d 676, 683-85 (1st Cir. 1987). The First Circuit seems to stand alone in explicitly permitting this type of instruction. Other circuits seem to disagree. See, e.g., United States v. Lizza Indus., Inc., 775 F.2d 492, 496-97 & n.2 (2d Cir. 1985); United States v. Nunez, 668 F.2d 1116, 1123 (10th Cir. 1981).

(2) It is within the discretion of the court to refuse to allow a witness to take the stand where it appears that the witness intends to claim the privilege as to essentially all questions. United States v. Johnson, 488 F.2d 1206, 1211 (1st Cir. 1973); accord United States v. Gary, 74 F.3d 304, 311-12 (1st Cir. 1996); Kaplan, 832 F.2d at 684.

2.14 Definition of "Knowingly"

[Updated: 6/14/02]

The word "knowingly," as that term has been used from time to time in these instructions, means that the act was done voluntarily and intentionally and not because of mistake or accident.

Comment

In United States v. Tracy, 36 F.3d 187, 194-95 (1st Cir. 1994), the First Circuit acknowledged a split of authority over how to define the term "knowingly." The Fifth and Eleventh circuits use the instruction stated above, emphasizing the voluntary and intentional nature of the act. Id. at 195. The Sixth, Seventh and Ninth circuits, on the other hand, embrace an instruction to the effect that "'knowingly' . . . means that the defendant realized what he was doing and was aware of the nature of his conduct, and did not act through ignorance, mistake or accident." Id. (quoting Seventh Circuit Instruction 6.04); see also Model Penal Code § 2.02(2)(b)(i).

Although the First Circuit in Tracy approved of the trial court's "voluntary and intentional" instruction under the circumstances of the case, it did not expressly adopt or reject either definition of "knowingly." 36 F.3d at 194-95. There may be cases when, given the evidence, the alternative instruction will be more helpful to the jury. But the term "nature" in the alternative instruction might incorrectly suggest to the jury that the actor must realize that the act was wrongful.

2.15 "Willful Blindness" As a Way of Satisfying "Knowingly"

[Updated: 6/14/02]

In deciding whether [defendant] acted knowingly, you may infer that [defendant] had knowledge of a fact if you find that [he/she] deliberately closed [his/her] eyes to a fact that otherwise would have been obvious to [him/her]. In order to infer knowledge, you must find that two things have been established. First, that [defendant] was aware of a high probability of [the fact in question]. Second, that [defendant] consciously and deliberately avoided learning of that fact. That is to say, [defendant] willfully made [himself/herself] blind to that fact. It is entirely up to you to determine whether [he/she] deliberately closed [his/her] eyes to the fact and, if so, what inference, if any, should be drawn. However, it is important to bear in mind that mere negligence or mistake in failing to learn the fact is not sufficient. There must be a deliberate effort to remain ignorant of the fact.

Comment

(1) This instruction is drawn from the instructions approved in United States v. Gabriele, 63 F.3d 61, 66 n.6 (1st Cir. 1995), and United States v. Brandon, 17 F.3d 409, 451-52 n.72 (1st Cir. 1994).

(2) The rule in the First Circuit is that:

> [A] willful blindness instruction is warranted if (1) the defendant claims lack of knowledge; (2) the evidence would support an inference that the defendant consciously engaged in a course of deliberate ignorance; and (3) the proposed instruction, as a whole, could not lead the jury to conclude that an inference of knowledge was mandatory.

Gabriele, 63 F.3d at 66 (citing Brandon, 17 F.3d at 452, and United States v. Richardson, 14 F.3d 666, 671 (1st Cir. 1994)); accord United States v. Coviello, 225 F.3d 54, 70 (1st Cir. 2000); United States v. Camuti, 78 F.3d 738, 744 (1st Cir. 1996). "The danger of an improper willful blindness instruction is 'the possibility that the jury will be led to employ a negligence standard and convict a defendant on the impermissible ground that he should have known [an illegal act] was taking place.'" Brandon, 17 F.3d at 453 (quoting United States v. Littlefield, 840 F.2d 143, 148 n.3 (1st Cir. 1988)).

2.16 Taking a View

[Updated: 6/14/02]

I am going to allow you to go to [insert location]. However, I instruct you that, while you are there, and on the way there and back, you are not to talk about what you see there or anything else relating to the case. You must simply observe. Do not do any independent exploration or experimentation while you are there.

Comment

United States v. Gray, 199 F.3d 547, 549-50 (1st Cir. 1999), held that a view is admissible evidence, thereby overruling Clemente v. Carnicon-Puerto Rico Management Associates, L.C., 52 F.3d 383 (1st Cir. 1995). The instruction is based on the court's approving quotation of a phrase from a law review note, Hulen D. Wendorf, Some Views on Jury Views, 15 Baylor L. Rev. 379 (1963). Gray suggests a number of advisable precautions in conducting a view.

2.17 Character Evidence

[Updated: 6/14/02]

[Defendant] presented evidence to show that [he/she] enjoys a reputation for honesty, truthfulness and integrity in [his/her] community. Such evidence may indicate to you that it is improbable that a person of such character would commit the crime[s] charged, and, therefore, cause you to have a reasonable doubt as to [his/her] guilt. You should consider any evidence of [defendant]'s good character along with all the other evidence in the case and give it such weight as you believe it deserves. If, when considered with all the other evidence presented during this trial, the evidence of [defendant]'s good character creates a reasonable doubt in your mind as to [his/her] guilt, you should find [him/her] not guilty.

Comment

This instruction is based upon United States v. Winter, 663 F.2d 1120, 1146-49 (1st Cir. 1981), and United States v. Lachmann, 469 F.2d 1043, 1046 (1st Cir. 1972). The First Circuit explicitly rejects the instruction that good character evidence "standing alone" is sufficient to acquit. Winter, 663 F.3d at 1145.